

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 25, 2006

**STATE OF TENNESSEE v. BILLY L. HALL**

**Direct Appeal from the Circuit Court for Marion County  
No. 6517     Thomas W. Graham, Judge**

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**No. M2005-02862-CCA-R3-CD - Filed November 21, 2006**

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The defendant, Billy L. Hall, was convicted of driving under the influence and possessing a handgun while under the influence of alcohol. On appeal, he challenges the sufficiency of the convicting evidence. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Mickey Hall, Winchester, Tennessee, for the appellant, Billy L. Hall.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Julia Sanders, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

Following a jury trial, the defendant was convicted of first offense driving under the influence "DUI" and possession of a firearm while under the influence of alcohol. He was sentenced to concurrent sentences of eleven months, twenty-nine days on each conviction. He was given credit for pretrial time served and was ordered to spend the remainder of his sentence on probation.

The facts giving rise to these convictions are gleaned from the trial testimony of Officer Kevin Hubbard with the Jasper Police Department. Officer Hubbard testified that on February 23, 2003, he was working the 4:00 p.m. to 4:00 a.m. patrol shift. Officer Hubbard explained that his routine patrol consisted of checking the business and residential areas of Jasper, as well as the businesses near the interstate exit, which included the Acuff Inn. On that particular night, Officer

Hubbard testified that his attention was drawn to a Chevy Suburban at the Acuff Inn that was backed into a parking space with the lights on and engine running. Officer Hubbard testified that it was between 12:30 and 1:00 a.m. when he noticed the vehicle.

Officer Hubbard testified that he got out of his patrol cruiser and approached the vehicle. Officer Hubbard stated:

I noticed the driver kind of slumped back in his seat and I knocked on the window, the driver's side window, several times, and the driver would never wake up, so at that time I checked the door handle and the door was unlocked, so I opened the door and immediately, when I opened the door I could smell the odor of what I believe was alcohol. I shook the driver several times, tried to get him to wake up and he finally . . . woke up after shaking him several times.

Officer Hubbard testified that he asked the driver, identified as the defendant, to exit the vehicle, and he reached in and turned off the ignition. Officer Hubbard said that he gave the defendant two field sobriety tests, determined he was intoxicated, and he placed him under arrest. While conducting a search incident to arrest, Officer Hubbard stated that he found "a liter bottle of vodka that was probably about three-fourths empty. . . . [and] two 40-ounce beers. . . . One of them was completely empty, the other one was about half empty." Officer Hubbard recalled that he also found a loaded 38-caliber handgun "in the back seat immediately behind the driver's seat, pretty much in the middle of the back seat." He said that the back seat was a bench-type seat, making the gun within the reach of the driver.

On cross-examination, Officer Hubbard admitted that he had not received any complaints or problem reports regarding the Suburban. Officer Hubbard also admitted that no one had told him that someone had been driving the Suburban. Officer Hubbard stated that when he found the defendant, the defendant was asleep or passed out in the driver's seat and his hands were not on the steering wheel. In response to questioning, Officer Hubbard stated that some Suburbans had three rows of seats, but he could not recall whether the defendant's vehicle had the third row back seat. However, he did recall the defendant's vehicle had a middle row seat. Officer Hubbard further stated that regardless of whether the vehicle had a third row back seat, the handgun was in the middle "back seat."

The parties stipulated that the defendant took a breathalyzer test which showed that he had a breath alcohol concentration of .22% , the legal limit being .10% at that time.

### **ANALYSIS**

On appeal, the defendant challenges the sufficiency of the convicting evidence. Specifically, he argues that the evidence was insufficient to prove that he was in physical control of his vehicle and insufficient to prove he had constructive possession of the handgun in the backseat of his vehicle.

Our review begins by reiterating the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Relevant to the defendant's DUI conviction, at the time of the offense, Tennessee Code Annotated section 55-10-401(a) provided as follows:

It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while . . . [t]he alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more.<sup>1</sup>

Our supreme court has instructed that the appropriate test for determining whether a defendant had "physical control" of a vehicle for purposes of the DUI statute is the totality of the circumstances approach. *State v. Lawrence*, 849 S.W.2d 761, 765 (Tenn. 1993). Under this approach, courts look to such factors as: "the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise." *Id.*; see *State v. Turner*, 953

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<sup>1</sup> The legislature has since amended the DUI statute to reduce the alcohol concentration necessary for a DUI conviction to eight-hundredths of one percent (.08%) or more. See Tenn. Code Ann. § 55-10-401(a)(2) (2003); 2002 Pub. Acts, c. 855, § 7, eff. July 1, 2003.

S.W.2d 213, 215 (Tenn. Crim. App. 1996) (noting that in enacting the DUI statute, “the legislature desired not only to prohibit the operation of a vehicle by an intoxicated individual, but also to remove from the inebriated the option of operating a vehicle”).

In the light most favorable to the state, the facts show that the defendant was in the driver’s seat of his Suburban, which was backed into a parking space at the Acuff Inn, an area “generally frequented by the public at large.” The defendant had a breath alcohol concentration of .22%, well over the legal limit. The defendant was alone in the vehicle, the keys were in the ignition, the motor was running, and the headlights were on. Although it appears that the defendant was passed out or asleep, and he avers that there was no proof that his vehicle was operational, the totality of the circumstances support the jury’s finding that the defendant had physical control of his vehicle. *See State v. Roger David Browder*, No. 02C01-9606-GS-00201, 1998 WL 47877, at \*8-9 (Tenn. Crim. App., at Jackson, Feb. 9, 1998), *perm. app. denied* (Tenn. Oct. 19, 1998) (concluding evidence sufficient to find defendant in physical control even when evidence indicated that defendant was unable to drive due to intoxication and injury). Thus, the defendant is not entitled to relief on this issue.

In addressing the defendant’s conviction of possession of a handgun while under the influence, Tennessee Code Annotated section 39-17-1321 states:

Notwithstanding whether a person has a permit issued pursuant to § 39-17-1315 or § 39-17-1351, it is an offense for a person to possess a handgun while under the influence of alcohol or any controlled substance.

As noted in the trial court’s charge to the jury, “possession” may be either actual or constructive. *See State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). While it appears that there are no Tennessee cases that have addressed the issue of constructive possession of a handgun under Tennessee Code Annotated section 39-17-1321, in addressing questions of constructive possession under other statutes, our courts have held that constructive possession requires that “a person knowingly have the power and the intention at a given time to exercise dominion and control over an object.” *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981) (quoting *United States v. Craig*, 522 F.2d 29, 32 (6th Cir. 1975); *see State v. Ronald Killebrew*, No. W2003-02008-CCA-R3-CD, 2004 WL 1196098, at \*2 (Tenn. Crim. App., at Jackson, May 26, 2004) (discussing constructive possession as it pertained to the felon in possession of a handgun statute, Tennessee Code Annotated section 39-17-1307 (2003)). Constructive possession is, in essence, the ability to reduce an object to actual possession. *State v. Ross*, 49 S.W.3d 833, 845-46 (Tenn. 2001).

In the light most favorable to the state, the evidence at trial shows that at the time of his arrest, the defendant was intoxicated in the driver’s side seat of his vehicle and had a loaded 38-caliber handgun lying in the middle of the backseat. Officer Hubbard testified that the gun was close enough that the defendant could reach it from where he was sitting. Although the defendant suggests that his vehicle might have had a third-row backseat in which the gun might have been located,

Officer Hubbard was adamant in his testimony that regardless of the number of rows of “back seats,” the gun was in the seat immediately behind the defendant. Again, constructive possession only requires that the person have the power and intention to exercise control over the object. With the gun in reach of the defendant, he had the ability to reduce the gun to his actual control. As such, sufficient evidence was presented for the jury to convict the defendant of possessing a handgun while under the influence of an intoxicant. Accordingly, the defendant is not entitled to relief on this issue.

### **CONCLUSION**

Upon review, we conclude the evidence was sufficient to support the defendant’s convictions. The judgments of the Marion County Circuit Court are affirmed.

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J.C. McLIN, JUDGE